

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DAN GIBSON

COMPLAINANT

v.

CELLULAR PHONE OF KENTUCKY, INC.,
D/B/A RAMCELL

DEFENDANT

)
)
)
)
) CASE NO. 95-430
)
)
)
)
)

O R D E R

On September 18, 1995, Dan Gibson ("Complainant") filed with the Commission a formal complaint against Cellular Phone of Kentucky, Inc., d/b/a Ramcell ("Ramcell"). Complainant alleges that the cellular facility ("facility") currently under construction by Ramcell near the city of Bronston, in Pulaski County, Kentucky, will adversely affect the value of his property. He asks that Ramcell either move the tower 500 feet further from his property or compensate him for any loss in the value of his property resulting from the construction of the tower. Ramcell received a certificate of public convenience and necessity to build and operate the facility by Commission Order dated June 27, 1995, in Case No. 95-184.¹ No complaints or requests to intervene were received by the Commission prior to issuance of the final order.

¹ Application of Cellular Phone of Kentucky, Inc. for Issuance of a Certificate of Public Convenience and Necessity to Construct Additional Cell Facilities in Kentucky Rural Service Area No. 6(B) (Burnside Cell Site).

Complainant was not party to Case No. 95-184, and only parties may request rehearing. KRS 278.400. Moreover, final orders of the Commission remain undisturbed absent extraordinary circumstances or the appearance of new evidence that was not available during the pendency of the case.

Complainant does not specifically request rehearing, although rehearing would be the practical result of the institution of proceedings on this Complaint. Complainant's legal theory appears to be that he received inadequate notice of the proposed construction, and therefore is entitled to be heard on the matter even though Case No. 95-184 is closed. However, it appears not only that Ramcell fulfilled all notice requirements as to Complainant, but that Complainant had actual knowledge of the proposed construction during the pendency of the case. Consequently, Complainant's objections were not timely filed, and the Complaint should be dismissed.

Utilities proposing to construct cellular telecommunications towers are required to supply certain information in, and to attach various documents to, their applications. For example, the utility must send letters to property owners and persons who reside within 500 feet of the proposed facility, notifying them of the proposed construction. The utility must also inform the Commission that such letter(s) were sent and supply copies of the correspondence. Ramcell sent the appropriate letter to Complainant, who owns property within 500 feet of the tower site, informed the Commission

of same, and attached a copy of the letter to its application. See Application at 3-4; Exhibit D to Application.

A letter to the Commission dated September 13, 1995, from Winter Huff, Esq., attorney for Complainant, states that apparently Ramcell sent the letter by registered mail, and Complainant was unable to visit the post office during business hours. Despite his failure to retrieve the letter from the post office, the Complainant knew -- when site preparation was first begun, and before the certificate was issued -- that the tower was to be built within 500 feet of his property. He also knew that Ramcell was the builder [Attachment to Complaint, at 2]. Complainant states he called Ramcell's office requesting that information be sent to him by regular mail. Later, he asked the company to meet with him to give him "plans." Id. Complainant says Ramcell neither met with him nor sent him information by regular mail.

Complainant himself states he realizes Ramcell "may have met the minimum requirements of notification" [Attachment to Complaint, at 2]. Complainant is correct. When there is no statute requiring actual notice, and the requirement is only that notice be mailed, "it is immaterial whether or not [the addressee] received the notice." Mrs. W.R. Klappert Moving & Storage Warehouse v. Muchlenkamp, 256 Ky. 506, 76 S.W.2d 597, 599 (1934). Moreover, Ramcell was obviously aware that Complainant knew of the proposed construction, since he had contacted the company twice to discuss the subject. Absent the filing of complaint, protest, or request for intervention by a third party, the Commission does not require

a cellular utility to do more, although the Commission encourages utilities to cooperate as fully as is reasonably possible with concerned citizens who live near proposed construction sites.

Finally, it is significant that Complainant had actual knowledge of the proposed construction in time to have filed a timely request for intervention with the Commission pursuant to 807 KAR 5:001, Section 3(8). As the court explained in Equitable Life Assurance Society of the United States v. Lawrence, Ky., 563 S.W.2d 717, 719 (1978), quoting 58 Am.Jur.2d, Notice, Section 4, "'actual knowledge supersedes a requirement of notice.'"

Even though the Complainant did not retrieve the letter of notice from the post office, he knew a tower would be built on the site prior to issuance of the certificate. Furthermore, he knew the name and telephone number of the company proposing the construction and, in fact, contacted it at least twice. He offers no reason why he did not contact the Commission prior to issuance of the final Order except to imply that he needed to see "plans" or "specifications" for the tower before registering his objection. However, the first paragraph of the Attachment to the Complaint makes it clear that Complainant believes any tower would adversely affect the value of his property. He has, in fact, filed this Complaint without having seen the plans for this tower [Attachment to Complaint, at 2].

The Commission being sufficiently advised, IT IS THEREFORE
ORDERED that the Complaint be, and it hereby is, dismissed.

Done at Frankfort, Kentucky, this 2nd day of October, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director